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NO. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHIRLEY I. SCRUGGS,

Petitioner,

vs.

DALE S. WILSON and HAROLD "BUDDY" JIMMISON, *ET. AL.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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3.1.97

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether the application of a statute of limitations to an illegitimate child violates the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution where such statute:

1.1. Limits the illegitimate's time for bringing an action to adjudicate her paternity to three years from birth;

1.2. Ran 42 years prior to the illegitimate's being granted the right to inherit by adjudication of paternity; and

1.3. Ran 52 years prior to the state's giving the illegitimate herself the right to adjudicate her own paternity.

2. Whether under the circumstances set forth in Question 1 above, application of the statute to an illegitimate violates her right to due process of law under the Fourteenth Amendment to the federal Constitution.

LIST OF PARTIES

Additional parties Respondent are H.H. Adams, Flora C. Jones, Louise G. Smith, Frank 0. Young, Alma Young, and Clyde S. Hicks.

All parties below are parties to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Shirley I. Scruggs, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in this case on July 18, 1996.

OPINIONS BELOW

The substituted opinion of the Supreme Court of Florida (App. 1a-17a), from which opinion this Petition is taken, is reported

at ____ So. 2d ____; the Supreme Court of Florida's denial of Petitioner's Petition for Rehearing thereof (App. 19a) is reported at ____ So. 2d ____; the initial opinion of the Supreme Court of Florida (App. 20a-34a) is unreported; the opinion of the First District Court of Appeal of Florida (App. 35a-51a) is reported at 640 So. 2d 1152; and the opinion of the Circuit Court of the 4th Judicial Circuit, State of Florida (App. 52a-54a) is unreported.

JURISDICTION

The Florida Supreme Court entered its initial judgment herein on November 22, 1995. A timely Petition for Rehearing was filed by Respondents herein and granted by the Florida Supreme Court, and pursuant thereto, the Florida Supreme Court withdrew its opinion, and entered its revised opinion on July 18, 1996. Petitioner timely filed a Petition for Rehearing, which was denied by the Florida Supreme Court on January 8, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves § 732.108(2), Florida Statutes (1991), Florida's statute governing proof of paternity in probate proceedings, and § 95.11(5)(a), Florida Statutes (1932) and its successor, § 95.11(3)(b), Florida Statutes (1991), Florida's statute of limitations providing time limits for actions to adjudicate paternity.

Florida's Probate/Inheritance by Intestacy statute, § 732.108(2), Florida Statutes (1991), provides as follows:

> "(2) For the purpose of intestate succession ..., a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if: (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out

> of wedlock, even though the attempted marriage is void. (b) The paternity of the father is established by an adjudication before or after the death of the father. (c) The paternity of the father is acknowledged in writing by the father."

Florida's statute of limitations, § 95(5)(a), Florida Statutes (1932), provided a limitation upon bastardy (paternity) actions of 3 years from birth of the illegitimate. § 95(3)(b), Florida Statutes (1991), provides a 4 year limitation upon paternity actions as follows:

> "...(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority."

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fourteenth Amendment to the Constitution of the United States. Section 1 of the Fourteenth Amendment provides in pertinent part as follows:

"No state shall...; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The Facts Material to the Questions Presented.

Petitioner alleged below that she is the illegitimate daughter of Charles W. Smith, deceased, who died on January 18, 1992 at the age of 82. She was born on February 22, 1932, and was issued a birth certificate from the State of Florida stating that her father was Charles Smith. No written acknowledgment of paternity is known to exist, nor did her mother and father ever participate together in a marriage ceremony, nor has a judgment establishing paternity ever been entered. After the decedent's death, a Petition for Probate of his alleged will was filed, the will was admitted to

probate and Letters Testamentary issued accordingly. Petitioner is not a beneficiary under such will. Petitioner timely filed a Petition for Revocation of Probate and Letters of Administration, in which Petitioner alleged that she was the daughter of the decedent, and that Decedent lacked testamentary capacity to make his Will, that the Will was the product of undue influence, and that it was the product of fraud, duress and mistake.

B. Statutory History Material to the Case.

Both Florida's statute of limitations applicable to proof of paternity and its Probate Code/Inheritance statutes are involved in the consideration of these questions.

1. Inheritance Rights. At the time of Petitioner's birth in 1932, she as an illegitimate had no right to intestate

inheritance from her natural father. The right of an illegitimate child to intestate inheritance was created by Chapter 16103, Section 30, Acts of 1933, which provided that a child born out of wedlock could inherit from the father only if the father acknowledged paternity in writing in the presence of a competent witness. This provision subsequently was numbered Florida Statutes § 731.29, and remained in effect until it was amended with the passage of Florida Statutes § 732.108(2) quoted at page 3 above, effective January 1, 1976.

2. Right to Adjudicate Paternity.

Prior to 1986, an illegitimate had no right to adjudicate her own paternity. The right of an illegitimate to adjudicate paternity in her own right was given to an illegitimate with the amendment of Florida Statutes § 742.011 (the paternity statute)

effective October 1, 1986, which amendment provided that "...any **child** may bring proceedings..." to establish paternity.

3. The Statute of Limitations.

The statute of limitations in effect and which applied to Petitioner at the time of her birth in 1932 was Florida Statutes § 95.11(5)(a), which imposed a 3 year limitation on the adjudication of paternity, with the time running from birth. This statute remained in effect until 1959, when Florida Statutes § 95.11(9) was enacted. It stated that a "bastardy proceeding" could be instituted at any time within 4 years of the date of birth of the illegitimate. In 1986, the statute was amended once again to its present form by the addition of the following language to the 4 year statute of limitations: "...with the time running from the date the child reaches the age of majority."

See Chart 1, Timeline Comparison, Factual and Statutory Interactions, App. 55a-56a.

C. The Proceedings Below.

The trial court dismissed Petitioner's Petition with prejudice, holding that under Florida's applicable Probate/Inheritance by Intestacy statute, Florida Statutes § 732.108(2)(b), the only method by which Petitioner could prove her paternity, and thus establish her right as an "interested person" to challenge the validity of decedent's will, was by an adjudication of paternity, and that she was time barred by Florida's 1986 statute of limitations, Florida Statutes § 95.11(3)(b), from doing so.

Petitioner appealed to the First District Court of Appeals of Florida, arguing, among other grounds, that the decision violated Petitioner's right to due

process and equal protection under the Fourteenth Amendment to the federal Constitution. The First District unanimously reversed the trial court, ruling that application of Florida's 1986 statute of limitations, Florida Statutes § 95.11(3)(b), to Petitioner constituted a denial of due process via access to courts, and noting that the decision would also constitute a denial of equal protection under both the Florida and Federal constitutions.

Respondents appealed such judgment to the Florida Supreme Court, which initially unanimously upheld the First District Court of Appeals upon other grounds, i.e. that the 1986 statute of limitations did not apply to Petitioner, thereby avoiding the constitutional issues.

Thereafter, Respondents filed a Petition for Rehearing which was granted, and the Florida Supreme Court unanimously reversed itself, issuing a substituted

opinion and ruling that the statute of limitations did apply to Petitioner, that the correct statute of limitations to apply was the original, 1932 3-year from birth statute, not the 1986 statute, and that application of the 1932 3-year from birth statute was not unconstitutional.

Petitioner thereafter filed a timely Motion for Rehearing, which was denied on January 8, 1997

D. How The Federal Questions Were Presented.

The federal questions were first raised at the trial court in response to Respondent's Motion for Summary Judgment. In addition to orally raising same at hearing, Petitioner raised both due process and equal protection violations in written form in Petitioner's Memorandum of Law at R. 58-68 (not reproduced herein), and again in Petitioner's Memorandum of Law at R. 86-88 (not reproduced herein).

The federal questions were again raised by Petitioner at Florida's First District Court of Appeals. Point 1 of Petitioner's Initial Brief to the First District Court of Appeals states regarding the issue of due process: "APPLICATION OF SECTION 95.11 (3)(b), FLORIDA STATUTES, TO APPELLANT CONSTITUTES RETROACTIVE APPLICATION OF AN ACT WHICH IMPOSED A NEWLY CREATED OBLIGATION, AND THEREBY DENIES APPELLANT'S RIGHT TO DUE PROCESS UNDER ARTICLE 1, SECTION 2, FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT, SECTION 1 OF THE UNITED STATES CONSTITUTION, IN THAT APPELLANT IS DENIED THE RIGHT TO PROVE THE PATERNITY OF HER FATHER."

Point 3 of Petitioner's Initial Brief to the Fisrt District Court of Appeals states regarding the issue of equal protection: "APPLICATION OF SECTION 732.108(b), FLORIDA STATUTES, TO APPELLANT DENIES APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, IN VIOLATION OF ARTICLE 2, FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT, SECTION 1, OF

THE UNITED STATES CONSTITUTION."

All of the federal questions were again raised by Petitioner at Florida's Supreme Court. The First District Court of Appeals ruling and the Florida Supreme Courts's focus upon and consideration of these issues is illustrated by the Florida Supreme Court's statement in its initial opinion at ____ So. 2d. ____ (App. 24a), referring to the First District Court of Appeals opinion considering such issues: "The District Court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, it would be unconstitutional as applied on the ground that it violated the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution."

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court opinion conflicts with the decisions of the United States Supreme Court and the Supreme Courts

of other states. The result of such conflicts is a lack of uniformity in the law as between states. Under the facts of this case before the Court, an illegitimate has the right to sue in Texas, Oklahoma and Montana, states which have addressed the issues herein.

I. Conflicts With Other Decisions.

A. An Impenetrable Barrier Has Been Erected.

The ruling of the Florida Supreme Court directly conflicts with the Supreme Court of Texas in Dickson v. Simpson, 807 S.W. 2d 726 (Texas 1991), which held on facts virtually identical to those in the instant case that an illegitimate was denied equal protection of the laws. The illegitimate child in Dickson, again a daughter, was born out of wedlock the same year as Petitioner. Similarly, the parents never married either before or after the birth of the child, and

the father never acknowledged paternity in writing, the two other methods for proving paternity under Texas law as well as under Florida law, and under the laws of many other states. There, as here, the only method available to the illegitimate daughter for her proof of her own paternity was to prove paternity through an adjudication.

There, as here, the paternity statute of limitations was applied to her. There, as here, the statute which was sought to be applied was amended several times during the illegitimate's life. There, as here, each time the statute was amended, the illegitimate was already beyond the age by which a petition for adjudication of paternity was required to be brought by the statute of limitations. The Texas Supreme Court held at 727 and 728 that the illegitimate child was **never given the opportunity** to prove her paternity, and therefore was denied equal protection of the laws. See chart 1, Timeline Comparison,

Factual and Statutory Interactions, App. 55a-56a.

In Petitioner's case, the statute of limitations applied by the Supreme Court in its substituted opinion was Florida Statutes § 95.11(5)(a), running 3 years from birth. For the first year, until 1933, there was a complete bar to her inheritance, leaving the window of 1933 and 1934 for the 1 and 2 year old Petitioner to prove paternity. As in Dickson, however, the statute ran prior to the Petitioner being given either the right to intestate inheritance by adjudication, or the right to adjudicate paternity herself.

At the time that statute ran in 1934, Petitioner had no right to intestate inheritance by adjudication of paternity, and would not have for another 42 years, until the right was granted by Florida Statutes § 732.108(2) in 1976. At that time, in 1934, Petitioner had no right to adjudicate her own paternity, and would not have for another 52 years, until the right was granted by Florida

Statutes § 742.011 in 1986. As in Dickson, the statute thus ran well before any right was given, and is therefore unconstitutional.

Application of the statute of limitations in effect at the time this case arose, Florida Statutes § 95.11(3)(b) enacted in 1986, gives the same result, however even more dramatically. That statute, it will be remembered, was the statute applied by the trial court and found to be unconstitutional by the District Court of Appeal. In that case, not only is the illegitimate effectively denied her right to prove paternity and to inherit under the first, 1932 statute, but is also denied her right to prove paternity and inherit by the 1986 amendment thereto.

Florida Statutes § 95.11(3)(b) (1991) provided that an action to adjudicate paternity must be brought within 4 years of the child's attaining the age of majority. The Petitioner attained majority (age 21) in 1953, thus if applied to Peittioner, the 1986

statute ran in 1957, 29 years before its enactment. At that time, in 1957, Petitioner had no right to intestate inheritance by adjudication of paternity, and would not have for another 19 years, until the right was granted by Florida Statutes § 732.108(2) in 1976. At that time, in 1957, Petitioner had no right to adjudicate her own paternity, and would not have for another 29 years, until the right was granted by Florida Statutes § 742.011 in 1986.

These results are the identical results ruled unconstitutional for denial of equal protection to the illegitimate by the Texas Supreme Court in Dickson, *supra*.

Application of state law in such a fashion creates the "impenetrable barrier" prohibited by this Court in Gomez v. Perez, 409 U.S. 535, 35 L.Ed. 2d 56, 93 S.Ct. 872 (1973). There, this Court enunciated the principle that illegitimate children could not be subjected to an "impenetrable barrier" to inheritance without violation of the equal

protection clause of the Fourteenth Amendment to the federal Constitution.

In Gomez, the illegitimate was totally denied the right to inherit; in the instant case, the illegitimate was totally denied the right to inherit for the first year of her life, until the right was granted in 1933, and thus provided only 2 remaining years before the statute of limitations imposed upon her ran. The Florida Supreme Court's decision creates an "impenetrable barrier" as to those 2 years for the illegitimate in that she could not inherit from the father by adjudication at the time of the running of the statute of limitations, and could not herself prove her own paternity by adjudication. Effectively, she has been denied the right to prove her paternity by an adjudication thereof, and the right to inherit, at any time throughout her entire life.

B. The Substantial Relationship Test is Violated.

Direct conflict with all recent decisions of this Court on the subject also exists if the "substantial relationship" test is applied, rather than the "impenetrable barrier" test. Thereunder, legislation must bear a substantial relationship to a legitimate or an important governmental interest. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-3, 31 L.ed. 2d 768, 92 S.Ct. 1400 (1972). No legitimate governmental interest was either considered or enunciated by the Florida Supreme Court.

In its substituted opinion, the Court for the **first time** applied the original 1932, 3 year-from-birth statute of limitations. **That statute had never been applied, nor briefed, nor argued before.** After reference to the 1955 Florida case of Wall v. Johnson, 78 So. 2d 371 (1955), the Court stated at App. 15a, that, "Therefore, when Scruggs

failed to bring a paternity action within the time required by the then valid statute of limitations, her claim was extinguished." Despite the Florida Supreme Court having before it the clear arguments set forth in the "impenetrable barrier" test above, the 1932 statute was applied in the substituted opinion without any attempt to justify same with an important governmental interest. There is one scant reference earlier in the opinion (A-10a) to the state interest in promoting certainty in paternity adjudications by requiring same during the putative father's lifetime. This concept the Florida legislature itself rejected, in that, as the District Court pointed out at 640 So. 2d 1152, Florida Statutes § 732.108(2)(b) allows the proof of paternity before or after the death of the father. No substantial relationship to an important governmental interest having been shown, the decision conflicts with Weber, *supra*, and all of this Court's several rulings applying the

intermediate scrutiny test thenceforth.

With the holding of the Supreme Court that the 1932 statute applied, there is further direct conflict with this Court's unanimous decision in Reed v. Campbell, 476 U.S. 852, 90 L. Ed. 2d 858, 106 S. Ct. 2234. There, this Court held that a total statutory disinheritance from the paternal estate unless the parents subsequently married unconstitutionally discriminated against illegitimates. Here, in 1932, the illegitimate could not even inherit in this manner, and could only inherit if paternity was acknowledged in writing with a witness.

Direct conflict in the length of the 3 year statute of limitations to establish paternity applied to Peitioner occurs in decisions of this Court and other state Supreme Courts. The Supreme Court of Montana struck a 3 year statute of limitations as violative of equal protection, the same length as the Florida statute, in State Depatrment of Revenue v. Wilson, 634 P. 2d

172 (1981). The Supreme Court of Oklahoma similarly struck a 3 year statute of limitations in Callison v. Callison, 687 P. 2d 106 (1984) . In Clark v. Jeter, 486 U.S. 456, 463, 100 L. Ed. 465 , 108 S.Ct. 1910 (1988), this court struck down a 6 year statute of limitations, and reviewed the law and several prior cases similarly striking down statutes of limitations. The Florida Supreme Court's abrupt application of the 1932 statute of limitations thus clearly conflicts with the rulings of this Court and other state Supreme Courts.

II. The Question Presented is Important.

Many illegitimate children enter this world with the curse of only one parent - the mother. Although the father bears equal responsibility for the child, all too often the father is able to hide behind the false cloak of uncertainty as to his own paternity, and accordingly does not contribute to the child's welfare in any manner, at any time,

be it at birth, during life, or at death. The moral responsibility for bringing a child into this world is a continuing responsibility, not ending at a child's majority, but requiring compassionate and nurturing care, whether psychological or financial, throughout a parent's life. While society's attitude toward the duty of fathers of illegitimate children to acknowledge, to care for and to support them is changing, and with it the law and our organic federal constitution, the father is often assisted in avoiding his responsibilities by restrictions placed upon the illegitimate's ability to prove who her father is. Such is the case in this Petition.

It is important for this Court to move with society, in the direction of society, to attempt the cure of society's ills, and to interpret our federal constitution accordingly - to move in the direction of promoting the illegitimate's own right to prove and enforce her paternity, rather than

confirmation of an outmoded concept of proof, which has the base effect of promoting a father's ability to avoid responsibility. This case is important to illegitimates and to society as a whole, for the purpose of moving the law and society in the proper direction, forward towards responsibility and the future, rather than backward towards protection of fathers who seek to avoid what is virtual certain proof of paternity, whether the father be dead or alive, with HLA and DNA testing's now established evidentiary techniques. This Court must not leave in the dark recesses of the law a hiding place for those who choose not to accept the consequences of their acts, and leave innocent illegitimates and society to bear the continuing burdens thereof, burdens which do not end at majority, but which often continue throughout the illegitimate's entire life. The right of an illegitimate to inherit by intestacy would therefore unquestionably assist in alleviating

society's burdens, and would place them where they belong - on irresponsible fathers.

Our society is changing. The class of illegitimate children in the United States is growing rapidly, with illegitimates becoming a more significant segment of our population daily. Their rights under the federal Constitution are thus becoming a more prevalent subject of legal concern and litigation, which litigation can only be expected to increase. In the case before the Court, an illegitimate was denied equal protection and due process under the 14th Amendment to the federal Constitution in areas of law which can reasonably be expected to be the subject of intense litigation in the future, (1) the right of an illegitimate herself to prove paternity, and (2) the right of an illegitimate to inherit from her natural father.

These areas of law and thus the rights of illegitimates is now clouded by outmoded concepts whose primary rationalizations

include promoting the institution of marriage and discouraging illegitimacy, which historically and clearly have been ineffective, and promoting certainty in proof of paternity and in the probate process, technologically antiquated concepts when we have available to us HLA and DNA testing with virtual certain proof of paternity, be the father dead or alive. Such scientific proof speaks louder, even from the grave, than can the self-serving denials of any putative father from the witness stand, and makes the death of the father irrelevant, as Florida's own statutes recognize by allowing for proof of paternity after the father's death. State courts are utilizing decisions of this Court, most notably Lalli v. Lalli, 439 U.S. 259, 58 L. Ed. 2d 303, 99 S. Ct. 518, and a vacuum created by lack of direction, to perpetuate such concepts, august and just as they may have been at the time of rendition, which deny constitutional rights to illegitimates, a more and more significant class of citizens

each day.

Clarification of former law, the pronouncement of new law, and the extension of federal constitutional rights to illegitimates in the arenas of their own right to prove their paternity and their right to inherit from their natural father, the person responsible for bringing them into this world, are therefore desperately needed by this Nation.

III. The Decision is Wrong.

Petitioner was granted a birth certificate by the State of Florida which stated that her father was Charles Smith, allegedly the decedent. Petitioner knew this to be true her entire life, and posessed in her birth certificate an official state document so indicating.

Florida law provides in § 382.20, Florida Statutes, that "Certificates filed and accepted under this section. . . shall be admissible in evidence as prima facie

evidence of the facts recited therein. . .". Under Florida law, therefore, Petitioner's birth certificate is admissible into evidence; it constitutes prima facie proof of the facts therein; the father's identity is stated therein, and is thus prima facie proved.

There is a high probability of truthfulness and verity in state documents such as a birth certificate, Smith v. Mott, 100 So.2d 173, 176 (Fla. 1957), and Petitioner had every right to depend upon same as proof of her paternity and did depend upon same.

At this late point in her life, to permit Florida to disavow its own birth certificate, the proof which Petitioner held so dear her entire life, to suggest that she herself, as a 1 and 2 year old child, waited too long to prove the very paternity which the state acknowledged to her in her birth certificate, and then to hold that she cannot even legitimate herself by an adjudication

because her right to do so terminated in 1934, 52 years before the right was granted in 1986, cannot be more wrong. Petitioner's case, and the case of all similarly situated illegitimates, cries out for the wisdom of this Court and for its just hand to dispense fundamental fairness.

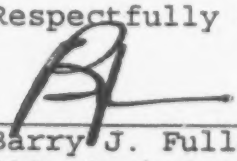
CONCLUSION

Application of Florida's paternity statute of limitations to Petitioner acts as the "impenetrable barrier" proscribed by this Court in Gomez v. Perez, *supra*, in that Petitioner never was provided the right to adjudicate her paternity. Such conclusion, and the conclusion that Petitioner was accordingly denied due process and equal protection of the laws under the Fourteenth Amendment to the federal Constitution, is shared by the Texas Supreme Court. The abruptly announced decision that a 1932 3-year statute of limitations applied to Petitioner has been held a denial of equal

protection by other state Supreme Courts and by this Court for up to 15 years. Florida's refusal to recognize its own birth certificate, prima facie proof of paternity itself and entitled to a high degree of truthfulness and verity, upon which Petitioner depended her entire life, and then its pronouncement that she cannot even prove her paternity by an adjudication because she delayed as a 1 and 2 year old in proving that which the state acknowledged to be prima facie fact, is unjust and wrong.

For the reasons stated, the Petition for Writ of Certiorari should be granted and the decision of the Florida Supreme Court should be reversed.

Respectfully Submitted,



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Supreme Court, U.S.
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Wilson V Scruggs (In re Estate of Smith) [21 FLW S332, 1996 Fla.SCt 10830]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. DALE S. WILSON, et al., Petitioners, vs. SHIRLEY I. SCRUGGS, Respondent.

Supreme Court of Florida.

Case No. 84,385. DALE S. WILSON, et al., Appellants, vs. SHIRLEY I. SCRUGGS, Appellee.

Case No. 84,386.

July 18, 1996.

HISTORY

Two Consolidated Cases: Application for Review of the Decision of the District Court of Appeal - Constitutional Construction, and An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity. 1st District - Case No. 93-731 (Clay County).

PRIOR HISTORY

Withdrawing opinion in, Substituting opinion at, Rehearing of, Wilson v Scruggs (In re Estate of Smith), 20 FLW S575, 1995 Fla.SCt 14870.

COUNSEL

Counsel: Timothy J. Corrigan and Beth E.

"APPENDIX A"

Luciano of Bedell, Dittmar, Devault & Pillans, P.A., Jacksonville; and Bruce D. Johnson of Donahoo, Donahoo & Ball, P.A., Jacksonville, for Petitioners/Appellants. Barry Fuller of Fuller & Associates, Orange Park, for Respondent/Appellee.

The Motion for Rehearing is granted. The opinion filed in this case on November 22, 1995, is withdrawn and the following opinion dated July 18, 1996, is substituted in lieu thereof.

HEADNOTES

Estates-Paternity-Limitation of actions-Statute of limitations for adjudication of paternity is applicable in action to establish paternity in probate case for purposes of inheritance-There is no separate and distinct statutory cause of action to establish paternity which begins to run upon death of putative father-When claimant failed to bring paternity action within time

required by statute of limitations which was applicable at time of her birth, which established a three-year limitation running from date of birth, her claim was extinguished-Claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in defendant-Application of statute of limitations for paternity actions to claimant's claim is not unconstitutional

ON MOTION FOR REHEARING GRANTED

[Original Opinion at 20 Fla. L. Weekly S575a] [Editor's note: Substituted opinion totally revises the original opinion.] <pg.2>(GRIMES, J.)

We review In re Estate of Smith, 640 So. 2d 1152 [19 FLW D1400, 1994 Fla.lDCA 4765] (Fla. 1st DCA 1994), which expressly and directly conflicts with King v. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988), and which declares a state statute to be

invalid. We have jurisdiction. Art. V, § 3(b)(1), 3(b)(3), Fla. Const.

The decedent Charles Smith died in 1992, leaving a will which was admitted to probate shortly after his death. Shirley Scruggs, at the age of sixty, filed a petition for revocation of probate and letters of administration, alleging that Smith had lacked testamentary capacity to make his will and that the will was the product of undue influence. Scruggs further alleged that she was the natural daughter of Smith and would inherit under the laws of intestacy if the will were revoked.

The trial court dismissed Scruggs' claim, finding that section 95.11(3)(b), Florida Statutes (1991), the statute of limitations for adjudication of paternity, barred Scruggs' claim. The district court of appeal reversed and remanded, holding that section 95.11(3)(b) did not apply to bar Scruggs from bringing a paternity action in

probate under section 732.108(2)(b), Florida Statutes (1991), for the purpose of establishing her right to intestate succession. The district court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, the statute would violate the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution.

Section 95.11 states in relevant part:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

In holding section 95.11(3)(b) inapplicable to Scruggs' claims, the district court of appeal referred to section 732.108(2), which

reads as follows:

> (2)For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity of the father is established by an adjudication before or after the death of the father.
>
> (c) The paternity of the father is acknowledged in writing by the father.

The court reasoned that section 732.108(2)(b), which was enacted in 1974, created a new statutory cause of action that was not subject to the time bar imposed by section 95.11(3)(b). The court concluded that section 95.11 applied only to paternity actions brought pursuant to chapter 742.<FN 1>

At the outset, we agree with the court below that paternity may be established in the course of probate proceedings. Section 742.10, Florida Statutes (1991), confirms this, providing in part:

> 742.10 Establishment of paternity for children born out of wedlock.- This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

However, the fact that paternity may be adjudicated in the course of probate proceedings does not mean that section 95.11(3)(b) is inapplicable to such proceedings. To the contrary, the reasoning of the court below ignores the plain language of section 95.11(3)(b), which states that it applies to an ''action relating to the

determination of paternity.'' Clearly, an adjudication under section 732.108(2)(b) is an action relating to the determination of paternity. Furthermore, chapter 95, entitled ''Limitations of Actions; Adverse possession,'' sets forth the limitations for all civil actions or proceedings unless a different time is prescribed elsewhere. § 95.011, Fla. Stat. (1991). There is no provision in the probate code which removes paternity adjudications brought in probate from the general statute of limitations of section 95.11(3)(b). Therefore, section 95.11(3)(b) applies. The Fifth District Court of Appeal reached the same conclusion in King.

Nor do we agree that section 732.108(2)(b) creates a separate and distinct statutory cause of action which begins to run upon the death of the putative father rather than when the child reaches the age of

majority.<FN 2> While it may be presumed that most paternity actions under chapter 742 are brought in order to obtain support, any determination of paternity made in such proceedings also determines paternity for purposes of intestate succession. Whether it is brought to obtain child support payments or to establish inheritance rights, a paternity action in either case must first adjudicate the preliminary issue of paternity. The statute of limitations applies to all adjudications of paternity and does not discriminate with respect to the ultimate purpose for which they are brought. The ability to conduct adjudications of paternity within different procedural contexts or for different purposes does not make them distinct causes of action or exempt them from a generally applicable statute of limitations in the absence of legislation to the contrary. To adopt the view of the court below would mean that in every instance a paternity claim could be strategically

delayed until the death of the putative father, thereby depriving him of the opportunity to deny the claim.<FN 3> See Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (in upholding New York statute which allowed inheritance by illegitimate child only if paternity order had never been entered during child's lifetime, Court expressed concern with the availability of the putative father as a substantial factor contributing to the fact-finding process).

Scruggs relies on In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. Ct. 1991), appeal denied, 600 A.2d 953 (Pa. 1991), and 600 A.2d 954 (Pa. 1991), which held that the statute of limitations for paternity actions did not apply to adjudications of paternity in probate for the purpose of proving heirship. We do not find Greenwood persuasive, as Pennsylvania's statutory framework differs from Florida's in several ways. First, the statute of

limitations at issue in Greenwood was housed in a chapter entitled ''Support Matters Generally.'' Id. at 752. Second, the Pennsylvania statute of limitations expressly referred to proceedings brought under the chapter for support. Id. Third, Pennsylvania law provided for two different standards of proof to establish paternity, depending upon the purpose for which the paternity suit was being brought. Id. at 754.

Having determined that section 95.11(3)(b) applies to any paternity action regardless of the purpose for which it is brought, we now turn to the constitutional question. When Scruggs was born, the applicable statute of limitations for paternity actions was three years running from the date of birth. A later statute which set the limitations period at four years from the date of birth was attacked in Department of Health & Rehabilitative Services v. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979). West involved a paternity action

brought by the Department for the purpose of obtaining child support. However, the suit had been filed a few months after the child's fourth birthday. The Court held that section 95.11(3)(b) was unconstitutional. In reaching our conclusion, we said:

> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued <pg.3>in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

West, 378 So. 2d at 1228. Thus, our holding in West was based on the premise that a child has a continuing right to child support until the age of majority that cannot be cut off before it has accrued. It is clear that we did not declare the statute facially unconstitutional but rather as applied to

claims for child support.

Subsequent decisions have recognized that West declared section 95.11(3)(b) unconstitutional only as applied. In Garris V. Cruce, 404 So. 2d 785 [1981 Fla.1DCA 3249] (Fla. 1st DCA 1981), review denied, 413 So. 2d 876 (Fla. 1982)# a paternity suit was filed in 1980 seeking a determination that Garris was the child of Cruce and therefore entitled to inherit from Cruce. The court held that Garris's claim was barred by the statute of limitations because she was born in 1949. In response to the argument that West had declared section 95.11(3)(b) unconstitutional, the court referred to the language quoted above from West approving the statute of limitations insofar as it set a time period for filing claims after they had accrued. The court pointed out that the limitations period prescribed by section 95.11(3)(b) already had run by the time Garris filed suit.

The court employed a similar analysis

in J.E.W. V. Estate of John Doe, 481 So. 2d 921 (Fla. 1st DCA 1985), review denied, 484 So. 2d 9 (Fla. 1986), in which the court's entire opinion stated:

> The motion for rehearing is DENIED. State Department of Health and Rehabilitative Services v. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979) is distinguishable from this case. In West the state was concerned with support of the minor child during the life of the father. The state's interest in securing support payments for the minor child is greater than avoiding stale claims. The instant case is one for declaratory judgment of paternity with no benefits sought or other relief claimed. It is a pure paternity action and barred by section 95.11(3)(b), Florida Statutes (1981). The appellant cannot seek support from the estate of his deceased father. Flagler v. Flagler, 94 So. 2d 592 [1957 Fla.SCt 407] (Fla. 1957). Flagler is a clear statement of the law and this court is obligated to follow that precedent.

Before West, this Court recognized the applicable statute of limitations in paternity actions as valid. Wall v. Johnson,

78 So. 2d 371 [1955 Fla.SCt 59] (Fla. 1955). Therefore, when Scruggs failed to bring a paternity action within the time required by the then valid statute of limitations, her claim was extinguished. Once a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant. Wiley V. Roof, 641 So. 2d 66 [19 FLW S334, 1994 Fla.SCt 4621] (Fla. 1994); accord Firestone Tire & Rubber Co. V. Acosta, 612 So. 2d 1361 [17 FLW S646, 1992 Fla.SCt 4119] (Fla. 1992).

In 1986, subsequent to West, the legislature passed a comprehensive social services act which contained several provisions relating to paternity. Ch. 86-220, Laws of Fla. Among them was section 139, which read:

> Section 139. Paragraph (b) of subsection (3) of section 95.11, Florida Statutes, is amended to read:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

The fact that the legislature was purporting to amend an existing statute rather than enact a new one indicates that the legislature itself recognized subsection (3)(b) was still on the books. The purpose of the amendment was to accommodate the decision in West. However, the 1986 amendment provides Scruggs no solace because even under its terms her claim had long since expired.<FN 4> Further, even if it could be argued that Scruggs was entitled to four additional years under the amended statute, she failed to make her claim within four years after the amendment was passed.

Accordingly, we find that section 95.11(3)(b) applies to paternity actions

brought in probate to determine heirship. We approve King and disapprove Odom to the extent that it conflicts with our opinion. We also hold that the application of the statute of limitations for paternity actions to Scruggs' claim is not unconstitutional. We quash the decision below and direct that the judgment of dismissal be reinstated.

It is so ordered.

(KOGAN, C.J., and OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.)

FOOTNOTE 1 Chapter 742, Florida Statutes (1991), entitled ''Determination Of Paternity,'' states in section 742.011 that ''any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise."

FOOTNOTE 2 Scruggs relies on In re Estate of Odom, 397 So. 2d 420 [1981 Fla.2DCA 1303] (Fla. 2d DCA 1981), for the proposition that section 732.108(2)(b) creates an entirely different cause of action. Odom, however, was concerned with reconciling section 732.108(2)(b), which allows an adjudication of paternity after death, with Bell V.

Setzer, 375 So. 2d 61 [1979 Fla.2DCA 2348] (Fla. 2d DCA 1979), which held that a paternity action for child support under chapter 742 abates upon the death of the putative father. While the duty of support of minor children may abate upon the death of the putative father, we disagree that the cause of action to establish paternity abates upon death as well. We also disagree with the premise that section 732.108(2)(b) creates an independent cause of action. That section merely explains the effect in probate of an adjudication of paternity. We note also that the child in Odom was a minor; thus, the Odom court did not address whether the statute of limitations applied in probate.

FOOTNOTE 3 Of course, the statute does not serve to bar a claim made after the death of the putative father where the claim was filed within four years of the child's reaching majority.

FOOTNOTE 4 While section 160 of chapter 88-220 stated that the amendment of any law by that act would not affect any previously accrued cause of action, this provision did not purport to reinstate causes of action.

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 8, 1997

IN RE: ESTATE CHARLES W. SMITH, deceased

DALE S. WILSON, et al.,
Petitioners/Appellants,

v.

SHIRLEY I. SCRUGGS,
Respondent.

CASE NOS. 84,385 & 84,386

District Court of Appeal,
1st District
No. 93-731

****

Respondent/Appellee's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur
KOGAN, C.J., dissents
ANSTEAD, J. , would grant rehearing and oral argument on rehearing

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. John Keene, Clerk
Hon. L. Thomas McAnnally, Judge
Mr. Timothy J. Corrigan
Ms. Beth E. Luciano
Mr. Bruce D. Johnson
Mr. Barry Fuller

"APPENDIX B"

Wilson V Scruggs (In re Estate of Smith)
[20 FLW S575, 1995 Fla.SCt 14870]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. DALE S. WILSON, et al., Petitioners, vs. SHIRLEY I. SCRUGGS, Respondent.

Supreme Court of Florida.

Case No. 84,385. DALE S. WILSON, et al., Appellants, vs. SHIRLEY I. SCRUGGS, Appellee.

Case No. 84,386.

November 22, 1995.

HISTORY

Two Consolidated Cases: Application for Review of the Decision of the District Court of Appeal - Constitutional Construction, and An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity. 1st District - Case No. 93-731 (Clay County).

SUBSEQUENT HISTORY

Opinion withdrawn, Substituted opinion, On rehearing, Wilson v Scruggs (In re Estate of Smith), 21 FLW 5332, 1996 Fla.SCt 10830.

"APPENDIX C"

PRIOR HISTORY

Approving, Scruggs v Wilson (In re Estate of Smith), 640 So.2d 1152, 19 FLW D1400, 1994 Fla.1DCA 4765.

COUNSEL

Counsel: Timothy J. Corrigan and Beth E. Luciano of Bedell, Dittmar, DeVault & Pillans, P.A., Jacksonville; and Bruce D. Johnson of Donahoo, Donahoo & Ball, P.A., Jacksonville, for Petitioners/Appellants. Barry Fuller of Fuller & Associates, Orange park, for Respondent/Appellee.

HEADNOTES

Estates-Paternity-Limitation of actions-Statute of limitations for adjudication of paternity is applicable in action to establish paternity in probate case for purposes of inheritance-There is no

separate and distinct statutory cause of action to establish paternity which begins to run upon death of putative father- Paternity action brought in probate is not barred by statute of limitations where statute which was in effect at time of claimant's birth was subsequently declared to be unconstitutional, and claim accrued prior to enactment of new statute of limitations governing paternity claims

OPINION

(GRIMES, C.J.) We review In re Estate of Smith, 640 So. 2d 1152 [19 FLW D1400, 1994 Fla.lDCA 4765] (Fla. 1st DCA 1994), which expressly and directly conflicts with King V. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988), and which declares a state statute to be invalid. We have jurisdiction. Art. V, § 3(b)(1), 3(b)(3), Fla. Const.

The decedent Charles Smith died in 1992, leaving a will which was admitted to probate shortly after his death. Shirley Scruggs, at the age of sixty, filed a petition for revocation of probate and letters of administration, alleging that Smith had lacked testamentary capacity to make his will and that the will was the product of undue influence. Scruggs further alleged that she was the natural daughter of Smith and would inherit under the laws of intestacy if the will were revoked.

The trial court dismissed Scruggs' claim, finding that section 95.11(3)(b), Florida Statutes (1991), the statute of limitations for adjudication of paternity, barred Scruggs' claim. The district court of appeal reversed and remanded, holding that section 95.11(3)(b) did not apply to bar Scruggs from bringing a paternity action in probate under section 732.108(2)(b), Florida Statutes (1991), for the purpose of establishing her right to

intestate succession. The district court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, it would be unconstitutional as applied on the ground that it violated the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution.

Section 95.11 states in relevant part:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

In holding section 95.11 inapplicable to Scruggs' claims, the district court of

appeal referred to section 732.108(2), which reads as follows:

> (2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity of the father is established by an adjudication before or after the death of the father.
>
> (c) The paternity of the father is acknowledged in writing by the father.

The court reasoned that section 732.108(2)(b), which was enacted in 1974, created a new statutory cause of action that was not subject to the time bar imposed by section 95.11(3)(b). The court

concluded that section 95.11 applied only to paternity actions brought pursuant to chapter 742.<FN 1>

At the outset, we agree with the court below that paternity may be established in the course of probate proceedings. Indeed, section 742.10, Florida Statutes (1991), provides in part:

> 742.10 Establishment of paternity for children born out of wedlock.-This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

This does not mean, however, that section 95.11(3)(b) is inapplicable to such proceedings. To the contrary, the reasoning of the court below ignores the plain language of section 95.11(3)(b), which

states that it applies to an ''action relating to the determination of paternity.'' Clearly, an adjudication under section 732.108(2)(b) is an action relating to the determination of paternity. Furthermore, chapter 95, entitled ''Limitations of Actions; Adverse Possession,'' sets forth the limitations for all civil actions or proceedings unless a different time is prescribed elsewhere. § 95.011, Fla. Stat. (1991). There is no provision in the probate code which removes paternity adjudications brought in probate from the general statute of limitations of section 95.11(3)(b). The Fifth District Court of Appeal reached the same conclusion in King V. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988).

Nor do we agree with Scruggs that section 732.108(2)(b) creates a separate and distinct statutory cause of action, which begins to run upon the death of the

putative father rather than when the child reaches the age of majority.<FN 2> While it may be presumed that most paternity actions under chapter 742 are brought in order to obtain support, any determination of paternity made in such proceedings also determines paternity for purposes of intestate succession. Whether it is brought to obtain child support payments or to establish inheritance rights, a paternity action in either case must first adjudicate the preliminary issue of paternity. The statute of limitations applies to all adjudications of paternity and does not discriminate with respect to the ultimate purpose for which they are brought. The ability to conduct adjudications of paternity within different procedural contexts or for different purposes does not make them distinct causes of action or exempt them from a generally applicable statute of limitations in the absence of legislation to the contrary. To adopt the

view of the court below would mean that in every instance a paternity claim could be strategically delayed until the death of the putative father, thereby depriving him of the opportunity to deny the claim.<FN 3>

Scruggs relies on In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. Ct. 1991), appeal denied, 600 A.2d 953 (Pa. 1991), and 600 A.2d 954 (Pa. 1991), which held that the statute of limitations for paternity actions did not apply to adjudications of paternity in probate for the purpose of proving heirship. We do not find Greenwood persuasive, as Pennsylvania's statutory framework differs from Florida's in several ways. First, the statute of limitations at issue in Greenwood was housed in a chapter entitled ''Support Matters Generally.'' Id. at 752. Second, the Pennsylvania statute of limitations expressly referred to <pg.2>proceedings brought under the chapter for support. Id. Third, Pennsylvania law

provided for two different standards of proof to establish paternity, depending upon the purpose for which the paternity suit was being brought. Id. at 754.

Having determined that section 95.11(3)(b) applies to any paternity action, regardless of the forum in which it is brought, we would ordinarily turn to the constitutionality of applying the statute to Scruggs' petition. However, we find it unnecessary to do so because, as explained below, we conclude that section 95.11(3)(b) does not bar Scruggs' claim.

When Scruggs was born, there was a four-year statute of limitations for paternity actions. However, this statute was declared unconstitutional in Department of Health & Rehabilitative Services V. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979), on the ground that it discriminated against illegitimate children.

In 1986, the legislature passed a

comprehensive social services act which contained several provisions relating to paternity. Ch. 86-220, Laws of Fla. Among them was a new statute of limitations which read:

> Section 139. Paragraph (b) of subsection (3) of section 95.11, Florida Statutes, is amended to read:
>
> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3)WITHIN FOUR YEARS.-
>
> (b)An action relating to the determination of <u>paternity, with the time running from the date the child reaches the age of majority</u>.

Chapter 86-220 also contained the following:

> Section 160. The repeal or amendment of any laws by this act shall not affect any cause of action which accrued prior to, or was pending upon, the effective date of this act.

Because the old statute of limitations had been declared unconstitutional, there was no limitations provision applicable to

Scruggs' claim at the time of the enactment of chapter 86-220.<FN 4> While this act created a new statute of limitations on paternity,<FN 5> section 160 clearly preserved Scruggs' cause of action against any bar created by the new statute.<FN 6> Therefore, the current section 95.11(3)(b) is inapplicable to Scruggs because her claim had accrued prior to the enactment of chapter 86-220.

Accordingly, we find that section 95.11(3)(b) applies to paternity actions brought in probate to determine heirship. However, we reach no constitutional issue because we hold that Scruggs' claim is not barred by section 95.11(3)(b). We disapprove Odom to the extent that it conflicts with our decision in this case. We approve the decision of the court below but disapprove of its rationale insofar as it holds that section 95.11(3)(b) does not apply to paternity actions filed in probate proceedings.

It is so ordered.

(OVERTON, HARDING and WELLS, JJ., concur. SHAW, KOGAN and ANSTEAD, JJ., concur in result only.)

FOOTNOTE 1 Chapter 742, Florida Statutes (1991), entitled ''Determination Of Paternity,'' states in section 742.011 that "any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise.''

FOOTNOTE 2 Scruggs relies on In re Estate of Odom, 397 So. 2d 420 [1981 Fla.2DCA 1303] (Fla. 2d DCA 1981), for the proposition that section 732.108(2)(b) creates an entirely different cause of action. Odom, however, was concerned with reconciling section 732.108(2)(b), which allows an adjudication of paternity after death, with Bell V. Setzer, 375 So. 2d 61 [1979 Fla.2DCA 2348] (Fla. 2d DCA 1979), which held that a paternity action for child support under chapter 742 abates upon the death of the putative father. While the duty of support of minor children may abate upon the death of the putative father, we disagree that the cause of action to establish paternity abates upon death as well. We also disagree with the premise that section 732.108(2)(b) creates an independent cause of action. That section merely explains the effect in probate of an adjudication of paternity. We note also that the child in Odom was a minor; thus, the Odom court did not address whether the

statute of limitations applied in probate. FOOTNOTE 3 Of course, the statute does not serve to bar a claim made after the death of the putative father where the claim was filed within four years of the child's reaching majority.
FOOTNOTE 4 Any other statute of limitations which might be said to be applicable to Scruggs' claim, see Wall V. Johnson, 78 So. 2d 371 [1955 Fla.SCt 59] (Fla. 1955), would suffer from the same deficiencies as the statute stricken in West.

FOOTNOTE 5 We recognize that section 160 refers to the ''repeal or amendment of any laws by this act,'' although at that time there was no statute of limitations on paternity actions because it had been declared unconstitutional several years before in West. However, the legislature obviously treated the statute as being still on the books and used amending language in section 139 to create a constitutional statute. Section 160 leaves no doubt of the legislature's intent to preserve existing causes of action.

FOOTNOTE 6 While the legislature could have provided a reasonable time for those affected by the statute to sue, see Folev v. Morris, 339 So. 2d 215 [1976 Fla.SCt 2681] (Fla. 1976), it chose to fully protect all existing causes of action which were already extinguished.

Scruggs V Wilson (In re Estate of Smith)
[19 FLW D1400, 640 So.2d 1152, 1994 Fla.1DCA 4765]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. SHIRLEY I. SCRUGGS, Appellant, V. DALE S. WILSON and HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK 0. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD ''BUDDY'' JIMMISON, Individually, Appellees.

1st District.

Case No. 93-731.

Opinion filed June 29, 1994.

HISTORY

An appeal from the circuit court for Clay County. L. Thomas McAnnally, Judge.

SUBSEQUENT HISTORY

Review granted, 651 So.2d 1196.

Approved, Wilson V Scruggs (In re Estate of Smith), 20 FLW S575, 1995 Fla.SCt 14870.

COUNSEL

Counsel: Barry J. Fuller, Orange Park, for

Appellant. Bruce D. Johnson of Donahoo, Donahoo & Ball, Jacksonville, for Appellees.

HEADNOTES

Estates-Paternity-Limitations statute for adjudications of paternity does not apply to action to establish paternity in probate case for purposes of inheritance-Where decedent did not die until 1992, retroactive application of 1986 statute to bar cause of action which, under the terms of the statute, would have expired in 1957, violates constitutional right of access to courts.

OPINION

(KAHN, J.)

Shirley I. Scruggs appeals from a final summary judgment in which the trial court determined that the statute of limitations in section 95.11(3)(b), Florida

Statutes (1991), bars her from bringing an action to determine her paternity for purposes of intestate succession. We find that Ms. Scruggs may institute an action to establish her paternity in a probate proceeding and reverse.

Ms. Scruggs was born out of wedlock in 1932. Her birth certificate lists her parents as Emily Isabel Johns and Charles Smith. Charles W. Smith died January 18, 1992. On January 28, 1992, his will was admitted to probate, and appellees Dale S. Wilson and Harold ''Buddy'' Jimmison were appointed personal representatives. Ms. Scruggs was not a beneficiary under the will. On April 20, 1992, Ms. Scruggs filed a Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith lacked testamentary capacity to make his will and that the will was the product of undue influence. Ms. Scruggs maintained that she was the natural daughter of Smith and would inherit under

the laws of intestacy if the trial court revoked the will. The personal representatives moved to dismiss for lack of standing. The trial court granted the motion to dismiss, finding that Ms. Scruggs' claim was barred by the statute of limitations for adjudication of paternity, section 95.11(3)(b), Florida Statutes (1991).<FN 1> Ms. Scruggs filed a motion for rehearing which was denied. Ms. Scruggs then filed an Amended Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith had acknowledged paternity in writing. The personal representatives filed a Motion for Summary Judgment which the trial court granted after determining that there was no factual issue as to the allegation that Smith acknowledged paternity of Ms. Scruggs since Ms. Scruggs failed to submit any proof of the allegation. The trial court also reiterated its prior ruling that the statute of

limitations bars Ms. Scruggs from adjudicating her paternity.

An illegitimate child is a lineal descendant of the father if ''[t]he paternity of the father is established by an adjudication before or after the death of the father.'' § 732.108(2)(b), Fla. Stat. (1991)(e.s.). Prior to the effective date of this provision in 1976, an illegitimate could only inherit from the father if the father had acknowledged the child in writing. § 732.29, Fla. Stat. (1973).<FN 2>

Section 732.108(2)(b) does not by its terms require the adjudication of paternity by an action pursuant to chapter 742. To the contrary, it would seem to us that inclusion in the Probate Code, chapter 732, of a provision allowing intestate succession by the illegitimate child of a father indicates that the issue of paternity may be properly adjudicated in

the probate proceeding. Indeed, chapter 742 confirms our view:

> This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs. or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

§ 742.10, Fla. Stat. (1991) (e.s.).

Since establishment of paternity may be accomplished ''under the statutes governing inheritance,'' we must determine whether the limitations provision relied upon by the trial judge, section 95.11(3)(b), applies to the present action, brought pursuant to section 732.108(2)(b).

Before its 1986 amendment, section 95.11(3)(b) provided merely that an action relating to the determination of paternity must be brought within four years. This

provision had existed since 1974. § 95.11(3)(a), Fla. Stat. (Supp. 1974). Its antecedent in the lineage of current section 95.11(3)(b) was enacted in 1959 as section 95.11(9), Florida Statutes (1959), and was the first statute of limitations made specifically applicable to paternity actions.<FN 3> This law provided that an action to establish paternity must be brought before the child reaches the age of four years or within four years of the last payment of support by the alleged father. On its face, then, the precursor statute fits within the framework of an action for support.

In further exploring the applicability of the statute of limitations, it is useful to examine the derivation of the Probate Code section under which appellant seeks her remedy. Before 1974, an illegitimate child could not inherit from her father unless the father had acknowledged the

child in writing. § 731.29, Fla. Stat. (1973). The present section 732.108(2)(b) emanates from chapter 74-106, Laws of Florida. Since an illegitimate who could not prove written acknowledgement could not inherit before passage of this law, we may safely conclude that during such time a paternity statute of limitations could never have been applied to bar determination of the right to inherit, nor could such an application have been contemplated by the legislature.

After the enactment of section 732.108(2)(b), a court observed that the ''legislature clearly intended that an action could be maintained for the determination of paternity for inheritance purposes . . . .'' In re Estate of Odom, 397 So.2d 420 [1981 Fla.2DCA 1303], 422 (Fla. 2d DCA 1981). The same court approved the holding of C.L.W. v. M.J., 254 N.W.2d 446 (N.D. 1977), in which the North Dakota

Supreme Court held "that the mother's right to bring an action during the father's lifetime to obtain a determination of paternity and support is a separate and distinct remedy from an action to determine paternity for the right to inherit.'' 397 So. 2d at 424. The North Dakota court said, and we now agree, ''The two are separate remedies for separate purposes." 254 N.W.2d at 450.

Acknowledging that the action to inherit is a separate remedy from a paternity action to establish support, we should not merely assume that the same statute of limitations applies to each. The action to inherit is a distinct statutory cause of action, not within the contemplation of the bar imposed by section 95.11(3)(b). The trial court erred by construing section 95.11(3)(b) as applying to frustrate appellant's effort to establish paternity solely for purposes of inheritance.

Moreover, having examined this matter in light of the Florida Constitution, we question the trial court's use of a 1986 statute to bar a cause of action which, under the terms of the statute, would have expired in 1957, four years after appellant attained her majority. Absent clear legislative intent to the contrary, the presumption is against retroactive application of a statute of limitations. Durring v. Reynolds, Smith & Hills, 471 So.2d 603 [10 FLW 1545, 1985 Fla.1DCA 2306] (Fla. 1st DCA 1985). Here, since Mr. Smith did not die until 1992, retroactive application of the statute would violate Ms. Scruggs' constitutional right of access to the courts in contravention of article I, section 21 of the Florida Constitution. Overland Constr. Co.. Inc. v. Sirmons, 369 So.2d 572 [1979 Fla.SCt 577], 573 (Fla. 1979).<FN 4>

We recognize that Durring and Overland Constr. Co. tested the constitutionality of

statutes of repose, and not statutes of limitation. These cases nonetheless apply to our analysis. This is so because in the present case the statute, as applied by the trial court, acts as a statute of repose, barring appellant's cause of action long before it ever accrued. See Whigham v. Shands Teaching Hosp. and Clinics. Inc., 613 So.2d 110 [18 FLW D407, 1993 Fla.lDCA 265], 112, n.4 (Fla. 1st DCA 1993) (''A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action . .

In 1979 the supreme court in State. Department of Health and Rehabilitative Services v. West, 378 So.2d 1220 [1979 Fla.SCt 3154] (Fla. 1979), found section 95.11(3)(b), Florida Statutes (1975),<FN 5> to be unconstitutional under the state and

federal constitutions. The court weighed the state's objective to avoid stale claims against the impact of the statute upon illegitimates deprived of their right to support. The observations of the West court, striking down the statute on equal protection grounds, are instructive today:

> Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children.
>
> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

378 So. 2d at 1227-1228. The court thus

addressed, and rejected, a policy argument based upon reducing stale claims. Further, although the court spoke in the idiom of equal protection, its resolution of the issue is germane to access to courts analysis-a support claim that had not yet accrued could not be barred. Thus unaccrued future support, available to legitimate offspring, could not be denied those born out of wedlock.

Ms. Scruggs' right to inherit did not vest until Smith died in 1992. § 732.101(2), Fla. Stat. (1991); Garris v. Cruce, 404 So.2d 785 [1981 Fla.1DCA 3249] (Fla. 1st DCA 1981), rev. denied, 413 So.2d 876 (Fla. 1982). It is well established that a statute of limitations will not begin to run until the occurrence of the last event which gives rise to the cause of action. § 95.031, Fla. Stat. (1991); Keller v. Reed, 603 So.2d 717 (Fla. 2d DCA 1992); Hynd v. Ireland, 582 So.2d 772 [16 FLW

D1847, 1991 Fla.4DCA 3003] (Fla. 4th DCA 1991). This maxim is inconsistent with an application of section 95.11(3)(b), since the statute purports to bar the action four years after the child attained the age of majority, an event which, as we have observed, took place some thirty-five years before Smith died. Preemption of appellant's claim by use of a statute which never allowed the claim to arise offends the Florida Constitution. We reach this result on access to courts grounds. We note, however, that a decision otherwise would place a burden on an illegitimate child seeking to inherit, not shared by legitimate offspring. West, supra. But see, Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (Supreme Court without majority opinion upheld a New York statute which allowed an illegitimate child to inherit only if a court, during the father's lifetime, has entered an order declaring paternity).<FN 6> As applied

below, the statute also treats similarly situated illegitimate children with disparity-for the child whose father dies during the child's minority, the right to seek inheritance is always preserved; for the child who is twenty-two or older at her father's death, the right would never be preserved.

Section 95.11(3)(b), as crafted by the legislature and applied by the trial court, would retroactively bar an action over three decades before the action accrued.<FN 7> It would also bar an action that was unknown to Florida law at the time the supposed bar attached. We conclude that the legislature, when it last amended the statute in 1986, neither anticipated nor intended its applicability to the facts at bar. Therefore on both statutory construction grounds and constitutional grounds we hold that section 95.11(3)(b) may not be utilized to bar appellant's action for inheritance. Since her petition

was timely for purposes of the Probate Code, she may proceed.

REVERSED and REMANDED.

(ERVIN and JOANOS, JJ., CONCUR.)

FOOTNOTE 1 Section 95.11(3)(b), Florida Statutes, provides that an ''action relating to the determination of paternity" must be brought within four years, "with the time running from the date the child reaches the age of majority.''

FOOTNOTE 2 This provision was held unconstitutional because it violated an illegitimate child's right to equal protection. In re Estate of Burris, 361 So.2d 152 [1978 Fla.SCt 1877] (Fla. 1978).

FOOTNOTE 3 Prior to 1959, a ''bastardy'' proceeding was subject to a three year statute of limitations under former section 95.11(5)(a) which applied to ''a liability created by statute.'' Wall v. Johnson, 78 So.2d 371 [1955 Fla.SCt 59], 373 (Fla. 1955).

FOOTNOTE 4 Florida's constitutional guarantee of access to courts restrains the legislature from abolishing a pre-existing statutory or common-law cause of action without providing an alternative form of redress. See Kluger v. White, 281 So.2d 1

[1973 Fla.SCt 3209] (Fla. 1973). The right to prove paternity in court was originally established by the Bastardy Act of 1828. B.J.Y. v. M.A., 617 So.2d 1061 [18 FLW S265, 1993 Fla.SCt 1617] (Fla. 1993).

FOOTNOTE 5 This is the same statute as section 95.11(3)(a), Florida Statutes (Supp. 1974), supra.

FOOTNOTE 6 Although we note the result in Lalli, we need not share the United States Supreme Court's concern with the availability of the putative father as "a substantial factor contributing to the fact-finding process." 439 U.S. at 271-272 (Powell, J. with two justices concurring). In Florida, the legislature has already decided that paternity may be proven after the father's death. §732.108(2)(b); West,, 378 So. 2d at 1225, n. 5.

FOOTNOTE 7 In Doe v. Shands Teaching Hospital and Clinics. Inc., 614 So.2d 1170 [18 FLW D585, 1993 Fla.1DCA 584] (Fla. 1st DCA), rev. denied, 626 So.2d 204 (Fla. 1993), we upheld the medical malpractice statute of repose, section 95.11(4)(b), Florida Statutes (1983), in the face of an access to courts challenge, even though the claim in that case was barred before the plaintiff knew or could have reasonably known she had an injury. As we specifically noted, however, a different analysis could be made where a new statutory enactment intervened to abolish an existing cause of action. 614 So. 2d at 1171. Here the 1986 statute came into being many years after appellant surpassed four years beyond the age of majority. The right of action in the present case is more like that in Diamond v. E.R. Squibb & Sons. Inc., 397 So.2d 671 [1981 Fla.SCt 1219] (Fla. 1981).

IN THE CIRCUIT COURT FOR
CLAY COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. :92-14-CP
DIVISION:C

IN RE:
ESTATE OF CHARLES W. SMITH, Deceased

SHIRLEY I. SCRUGGS,
PETITIONER

V.

DALE S. WILSON AND HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK 0. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD "BUDDY" JIMMISON, Individually, RESPONDENTS

FINAL JUDGMENT

THIS cause coming to be heard upon Respondents', DALE S. WILSON and HAROLD "BUDDY" JIMMISON, Motion For Summary Judgment and counsel for both parties being present and before tiie Court, and the Court having heard the arguments of counsel and being fully advised in the premises finds that none of the three alternatives under Florida Statutes Section 732.100(2) can be met to establish Petitioner as a potential

heir and Petitioner is not an interested party to challenge decedent's will because:

1. There is no genuine factual issue as to Petitioner's allegation that the decedent acknowledged paternity of the Petitioner in writing due to Petitioner's failure to submit any substantiation for that allegation;

2. Petitioner has acknowledged that her mother was never married to the decedent and that the decedent was never adjudicated to be her father; and

3. Adjudication of paternity is barred by the Statute of Limitations.

It is thereupon,

ADJUDGED THAT:

1. Respondents' Motion For Summary Judgment is hereby granted.

2. Petitioner's First Amended Petition For Revocation Of Probate And Letters Of Administration is hereby dismissed with prejudice and final judgment is entered for Respondents.

DONE AND ORDERED at Green Cove Springs, Clay County, Florida this 8th day of February, 1993.

L.Thomas McAnnally /s/
CIRCUIT JUDGE

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CHART I
TIMELINE COMPARISON
FACTUAL AND STATUTORY INTERACTIONS

YEAR	STATUTE OF LIMITS. OR EVENT	ILLEGIT. RIGHT TO ADJUDICATE PATERNITY	ILLEGIT. RIGHT TO INHERIT BY ADJUDICA-TION
1932	BIRTH OF PETITIONER	NO	NO
1932	S/L 3 YEARS FROM BIRTH	NO	NO
1935	FIRST S/L RUNS IF APPLIED	NO	NO
1936	1959 S/L RUNS IF APPLIED	NO	NO
1957	1986 S/L RUNS IF APPLIED	NO	NO
1959	S/L AMENDED 4 YEARS FROM BIRTH	NO	NO
1976	S/L 4 YEARS FROM BIRTH OR LAST SUPPORT	NO	RIGHT FIRST GIVEN

"APPENDIX F"

1986	S/L AMENDED 4 YEARS RUNNING FROM AGE OF MAJORITY (21)	RIGHT FIRST GIVEN TO ILLEGIT.	YES